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In the Supreme Court of the United States

OCTOBER TERM, 1976

HAROLD PETER ENTRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 634.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1976. A timely petition for rehearing was denied on April 1, 1976. The petition for a writ of certiorari was filed on April 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the taking of an inventory, in the presence of an agent of the FBI, of a damaged shipment of air freight by employees of a commercial airline constituted a search in violation of petitioner's rights under the Fourth Amendment.

2. Whether the FBI agent's acquisition, from employees of a commercial airline, of obscene material discovered during an inventory of a damaged shipment of air freight constituted a seizure under the Fourth Amendment.

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of having used a common carrier to transport obscene material interstate, in violation of 18 U.S.C. 1462. He was sentenced to ninety days' imprisonment, to be followed by two years' and nine months' probation. The court of appeals affirmed (Pet. App. A).

The evidence at trial, as described by the court of appeals (Pet. App. A-2 to A-3), showed that on May 8, 1974, a two-package shipment of air freight addressed to petitioner arrived in St. Louis, Missouri, at the Lambert Field office of Trans World Airlines. The larger of the two packages had been torn open and some of its contents appeared to have been pilfered. James Eberhardt, a TWA cargo manager, notified FBI Agent Leon Cantin of a possible theft from an interstate shipment and that company policy required that an inventory be made of the shipment to determine the extent of any loss (Stp. 4).[1] Because Cantin was involved that day in another investigation, he requested that Eberhardt delay the inventory until the following morning.

Had the packages addressed to petitioner arrived at the Lambert Field office in an undamaged condition, employees of TWA would have forwarded them to the

[1] "Stp." refers to the factual stipulations between petitioner and the government.

local Emery Air Freight office for delivery to petitioner. An employee of TWA notified Emery on May 8 that the packages had been damaged, and that TWA was retaining them for inventory. When petitioner went to the Emery Air Freight office on May 8 to pick up the packages, an Emery employee informed him that the packages had been damaged, and apparently pilfered, and that they were being held pending an investigation by the FBI. Petitioner never returned to claim the packages.

On the morning of May 9, 1974, Agent Cantin arrived at TWA's Lambert Field office and found that TWA employees already had cut open the damaged package. In Cantin's presence, Eberhardt and two other TWA employees—Jack Dvorak and Jim Stinson,[2] who were acting at Eberhardt's direction—inventoried the contents of the package. They also opened and inventoried the smaller package in order to locate the packing slip for the shipment and complete their assessment of loss. Cantin did not urge the airline employees to open either package and, as petitioner concedes (Pet. 8), the agent did not participate in the inventory.

The invoice recovered from the smaller package indicated that the shipment contained 124 "leather novelties." In fact, however, the packages contained 114 reels of 8 mm films in containers marked "not to be sold to minors." Advertising brochures were packed with the films, graphically illustrating the films' contents.[3]

[2] The references in the petition to Stinson as "Agent Stinson" (Pet. 9, 13, 14) are incorrect (Stp. 3; Tr. 7-8).

[3] Petitioner did not contend in the court of appeals (see Pet. App. A-3), and does not contend here, that the films and brochures were not obscene.

After viewing this material, Agent Cantin, acting without a warrant, took it from the premises to the FBI office. Petitioner was indicted subsequently on the basis of two of the films discovered during the inventory.[4]

ARGUMENT

1. Petitioner contends (Pet. 12-13) that the inventory taken by employees of TWA constituted a search in violation of his rights under the Fourth Amendment. This contention is without merit.

The Fourth Amendment protects against unreasonable intrusions by the government but does not limit private conduct. *E.g., Burdeau* v. *McDowell*, 256 U.S. 465, 475; *United States* v. *Pryba*, 502 F. 2d 391, 397-398 (C.A. D.C.), certiorari denied, 419 U.S. 1127. In the present case, the decision to inventory the contents of the packages addressed to petitioner was made by employees of TWA. Although an agent of the FBI was present during the inventory, the agent did not ask for or participate in the inventory. Neither was the inventory taken for law enforcement purposes, so as to raise doubts concerning whether the inventory was truly private in nature; rather, the evidence showed that the inventory was undertaken by TWA employees, pursuant to company policy, to determine the extent of any loss from or damage to the packages (see Pet. App. A-2). As the court noted in *United States* v. *Pryba*, *supra*, 502 F. 2d at 398 (footnotes omitted):

> [W]here the search is made on the carrier's own initiative for its own purposes, Fourth Amendment protections do not obtain for the reason that only the activities of individuals or nongovernmental entities are involved. So frequently and so emphatically have the courts enunciated and applied these principles that, at least for the time being, they must be regarded as settled law.[5]

[4] A third film introduced at trial was seized in April 1975 pursuant to a search warrant that was issued in part on the basis of the materials discovered during the inventory taken by TWA employees on May 9, 1974 (see Pet. App. A-3).

2. Petitioner also contends (Pet. 14-15) that Agent Cantin's acquisition of the packages and their contents from TWA employees amounted to an unlawful seizure under the Fourth Amendment.

Not every acquisition by the government of physical evidence constitutes a seizure subject to the proscriptions of the Fourth Amendment. In *Coolidge* v. *New Hampshire*, 403 U.S. 443, for example, this Court held that acquisition by the police of guns and clothing, later introduced at trial, from the defendant's wife did not implicate the Fourth Amendment because such items had been given to the police voluntarily. Similarly, the Court of Appeals for the Ninth Circuit, sitting *en banc*, recently held on facts similar to those present here (*United States* v. *Sherwin*, No. 73-3124, decided July 2, 1976, slip. op. 7-8 (citation and footnote omitted)):

[5] Petitioner attempts to distinguish *United States* v. *Pryba*, *supra*, and *United States* v. *Echols*, 477 F. 2d 37 (C.A. 8), certiorari denied, 414 U.S. 825, by suggesting that in both cases employees of the carriers involved acted to protect either persons or property "from the possibility that some harmful object [might have been] contained in the objects searched" (Pet. 13). But in neither case did the court so limit its decision (indeed, in *Pryba*, airline employees opened packages destined for the defendant because they suspected that the packages, ultimately found to contain obscene films, contained narcotics). Petitioner has not referred to any case holding that an otherwise private inventory loses its private character if undertaken to determine the extent and nature of any loss that might have been sustained.

A consensual transfer is by definition not a seizure. * * * The private person's legal authority to approve a transfer of objects found in a private search has no bearing on whether his relinquishment of those objects to the government is coerced or voluntary. In *Coolidge* [v. *New Hampshire, supra*], for example, there was no indication the wife had any authority over the objects turned over, nor were the police required to determine the scope of her authority. If a transfer is voluntary, then it is not a seizure and the fourth amendment's reasonableness standard is simply inapplicable.[6]

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[6]Two judges dissented from this holding on the basis of the Eighth Circuit's contrary holding in *United States* v. *Kelly*, 529 F. 2d 1365 (slip op. 10). But in *Kelly*, also relied upon by petitioner (Pet. 12, 14-15; Pet. App. B), the panel simply stated in relevant part without analysis that "[a]lthough the FBI seizure of the books and magazines was made with the consent of the [United Parcel Service, the common carrier involved], it is clear that such consent does not satisfy the requirements of the Fourth Amendment" (529 F. 2d at 1371). In support of that conclusion, the panel referred to *Stoner* v. *California*, 376 U.S. 483. The issue in *Stoner*, however, was whether the search of the defendant's hotel room by police officers was subject to the Fourth Amendment despite the fact that consent to search had been given by a hotel night clerk. Unlike the situation in *Stoner*, the Fourth Amendment is not applicable to the initial intrusion that occurred in the present case because that intrusion was private, rather than governmental, in nature.

While there is a conflict between the holdings in *Sherwin* and *Kelly*, the holding in the present case conflicts with neither (see discussion *infra*, pp. 7-8); consequently, the petition in this case does not present an occasion to resolve an inter-circuit conflict. It is at least possible, moreover, that the panel that decided *Kelly* would reconsider its summary conclusion concerning the impact of the Fourth Amendment on consensual transfers, if presented with a case involving that issue, in light of the extended analysis of the issue by the full court in *Sherwin*.

Even if it is assumed, however, that Agent Cantin's acquisition of the packages and their contents from TWA employees amounted to a seizure, that "seizure" was lawful under the Fourth Amendment. In *Roaden* v. *Kentucky*, 413 U.S. 496, the film in question was seized by a sheriff, incidental to the warrantless arrest of the theater manager, after the sheriff had viewed the film in the theater. This Court directed that the film be suppressed because the seizure, when considered in terms of the First Amendment, was unreasonable under the Fourth Amendment. In explaining its holding, this Court stated (413 U.S. at 503-504; footnote omitted):

> The common thread of *Marcus* [v. *Search Warrant*, 367 U.S. 717], *A Quantity of Books* [v. *Kansas*, 378 U.S. 205] and *Lee Art Theatre* [v. *Virginia*, 392 U.S. 636] is to be found in the nature of the materials seized and the setting in which they were taken. * * * In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore of the commercial theater, each presumptively under the protection of

> the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.

The present case stands on an entirely different footing. There was no seizure here of a "film then being exhibited to the general public." Neither was there a showing that the material addressed to petitioner was on the "threshold of dissemination." See *Mishkin* v. *New York*, 383 U.S. 502, 513; *Heller* v. *New York*, 413 U.S. 483, 492 n. 8. Nor is it possible to assert that the FBI's acquisition of the material was tantamount to the seizure "of all the books in a bookstore" (*Roaden, supra*, 413 U.S. at 504). At most, the FBI here acquired material that had been subjected to a private inventory. There was nothing to show what petitioner intended to do with the material had it been given to him. Indeed, petitioner came only once for the packages and, upon being told that they were being inventoried, he never returned. Cf. *Abel* v. *United States*, 362 U.S. 217, 238.

Had the material been forwarded by TWA to Emery Air Freight for delivery to petitioner, moreover, there was—as the court of appeals noted (Pet. App. A-5)—"a genuine danger * * * that the evidence would be destroyed." Viewed in this setting, we submit that the "seizure" that occurred here was reasonable and did not violate petitioner's rights under the Fourth Amendment. Compare *United States* v. *Cangiano*, 491 F. 2d 906, 913 (C.A. 2), certiorari denied, 419 U.S. 904.[7]

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[7] When material is seized in violation of the First Amendment rather than the Fourth Amendment, the appropriate remedy is not, in any event, to suppress it as evidence at trial but to order its return. See *Heller* v. *New York*, *supra*, 413 U.S. at 493 n. 11; *United States* v. *Sherwin*, *supra*, slip op. 9 n. 11. This difference in remedy reflects the fact that "the principal object of the Fourth Amendment is the protection of privacy rather than property * * *" (*Warden* v. *Hayden*, 387 U.S. 294, 304).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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